Filed 9/19/06 Alarid v. K. Hovnanian Forecast Homes CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| MARTIN F. ALARID,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>K. HOVNANIAN FORECAST HOMES, INC.,<br><br>Defendant and Appellant. | E038491<br><br>(Super.Ct.No. RIC391141)<br><br>O P I N I O N |

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Reversed.

Copenbarger & Ross, Paul D. Copenbarger, Mark A. Ross, and Suzan N. Tran, for Defendant and Appellant.

William H. Strohmeyer for Plaintiff and Respondent.

## INTRODUCTION

Defendant, K. Hovnanian Forecast Homes, Inc. (K. Hovnanian), appeals from a judgment entered in favor of plaintiff, Martin F. Alarid, following a nonjury trial. In a

statement of decision, the trial court concluded that K. Hovnanian breached a real estate purchase and sale agreement with Alarid by failing to close escrow by January 3, 2003, on the sale to Alarid of a newly constructed home in Winchester. Escrow closed 20 days later, on January 23, and Alarid rented the home to his stepdaughter.

As a result of the delay in closing escrow, Alarid was unable to defer capital gains taxes on his prior, July 9, 2002, sale of a rental property in Lakewood which he intended to exchange for the Winchester home under Internal Revenue Code section 1031. Because escrow on the sale of the Winchester property did not close within 180 days of the sale of the Lakewood property, the exchange did not meet the requirements of Internal Revenue Code section 1031. Alarid was awarded $44,478, the amount of capital gains taxes he incurred on his sale of the Lakewood property, plus costs and prejudgment interest.

K. Hovnanian contends the trial court erroneously interpreted the written purchase and sale agreement as including a covenant to close escrow on or before January 3, 2003. K. Hovnanian argues that the trial court's interpretation was erroneously based on parol evidence -- principally the testimony of Alarid and his wife, Francis -- which *contradicted* the express terms of the agreement. We agree. The written purchase and sale agreement expressly provided that escrow would close no later than July 28, 2003, or one year from the effective date of the agreement, but not by January 3, 2003. Under the

parol evidence rule, no extrinsic evidence was admissible to contradict this term. Accordingly, we reverse the judgment in favor of Alarid.[1]

## FACTS AND PROCEDURAL HISTORY

### A. *Background*

Alarid purchased the Lakewood property in 1984, held it as a rental property, and closed escrow on the sale of the property on July 9, 2002. He planned to purchase a "like-kind" property in the Temecula area, where he had lived since 1997, and defer his capital gains tax liability on his sale of the Lakewood property. He believed he could obtain a better return on a Temecula-area property, and no longer wished to maintain the Lakewood property because it was a long distance from his Temecula home.

Under Internal Revenue Code section 1031, if the proceeds of sale of property (the relinquished property) are invested in a like-kind property (the replacement property), any capital gains tax owed on the sale of the relinquished property is deferred pending the sale of the replacement property. The replacement property must be identified within 45 days of the sale of the relinquished property, and the taxpayer must "receive" the replacement property within 180 days of the sale of the relinquished property. (26 U.S.C.A. § 1031(a).)

Thus, Alarid had until August 28, 2002, to identify a replacement property, and until January 3, 2003, to close escrow on his purchase of the replacement property. He

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[1] In light of our conclusions, we do not reach K. Hovnanian's contention that the $44,478 in damages awarded were speculative.

was also required to place the sales proceeds from the Lakewood property with a qualified intermediary, which he did by placing the proceeds with First American Exchange Corporation of California. (26 U.S.C.A. § 1031(a).)

Alarid and his wife, Francis, began looking for a replacement property in the Temecula area shortly after Alarid's July 9, 2002, sale of the Lakewood property. They looked at approximately 12 existing homes and several new home development projects. At each project, Alarid asked whether the builder was willing to structure a sale as a like-kind exchange. Each time, he was told the builder would not so agree, because the builder could not promise that the new home could be completed and sold in time for Alarid to meet the timing requirements of a like-kind exchange.

Finally, Alarid and Francis visited K. Hovnanian's French Valley IV development in Winchester. There they met with K. Hovnanian's sales representative, Rebecca Diaz. In response to Alarid's questions, Diaz told Alarid she knew what an Internal Revenue Code section 1031 exchange was and that K. Hovnanian was willing to structure a new home sale as an Internal Revenue Code section 1031 exchange.

Alarid told Diaz he had a transfer deadline of January 3, 2003, and if that deadline was not met he would incur capital gains taxes on the sale of his Lakewood property. He told Diaz he did not want to purchase a home from K. Hovnanian if escrow could not close by January 3, 2003. On July 28, 2002, Alarid and Diaz sat down in her office, and Diaz drafted a written purchase and sale agreement on her computer.

B. *The Express Terms of the Agreement*

The purchase and sale agreement is a preprinted form document, four pages in length. On page 1, it states that its effective date is "07/28/02"; identifies the property to be purchased; states a total purchase price of $253,490; and requires a $1,000 deposit. Alarid and Diaz signed the agreement on July 28, 2002. K. Hovnanian's area manager, Douglas Stewart, later signed the agreement.

In paragraph V, entitled "ESCROW," the agreement states that the buyer (Alarid) agrees "to execute any documents . . . in order to . . . complete the purchase of the Property on or before 11/25/02, or within seven (7) days after Buyer is notified that all applicable governmental inspections are recorded." The "11/25/02" date is inserted in a blank space. The other terms of paragraph V are preprinted.

In paragraph VII, the agreement states, in preprinted language, that, "The Property shall be delivered to Buyer upon Close of Escrow. Seller is to complete construction, and close Escrow for the Property, on or before that date which is one (1) year after the Effective Date. If the Escrow does not close, on or before the one (1) year date for the close set forth above, or a later closing date mutually agreed to by Buyer and Seller, then Seller shall, within fifteen (15) days from Seller's actual receipt of Escrow Company's written notice of the cancellation of the Escrow, return all of Buyer's deposits, without deductions of any kind or amount, other than the Liquidated Damages that may be owing to Seller . . . ."

Paragraph VII, entitled "DELIVERY OF POSSESSION," states, in preprinted capital letters, that, "THE DATE OF COMPLETION SET OUT IN PARAGRAPH V

(ESCROW) ABOVE, IS AN ESTIMATE ONLY. THE ACTUAL SCHEDULING OF CONSTRUCTION IS DIFFICULT TO DETERMINE AND DELAYS ARE COMMON. WHILE SELLER WILL TRY TO ABIDE BY THE SCHEDULE, SELLER DOES NOT GUARANTEE ANY SPECIFIC COMPLETION DATE (OTHER THAN THE ONE (1) YEAR DATE NOTED ABOVE) AND SHALL NOT BE RESPONSIBLE FOR ANY INCONVENIENCE, LOSS OR EXPENSE INCURRED BY BUYER WHICH ARISES FROM ANY DELAYS IN COMPLETING THE PROPERTY AFTER THE DATE SET OUT IN PARAGRAPH V, BUT BEFORE THE ONE (1) YEAR DATE DESCRIBED IN THIS PARAGRAPH VII."

Paragraph VIII is an integration clause. It states: "This Agreement in conjunction with the Ancillary Documents constitutes the unified, consolidated, integrated and sole agreement between Buyer and Seller. . . ." In paragraph XI, entitled "ACKNOWLEDGEMENTS," the agreement states, in preprinted, capital letters, that: "NO MODIFICATION OR AMENDMENT SHALL BE EFFECTIVE UNLESS IN WRITING AND SIGNED BY BOTH BUYER AND SELLER. . . . ANY ATTEMPTED MODIFICATION NOT IN KEEPING WITH THIS REQUIREMENT SHALL BE NULL AND VOID AND UNENFORCEABLE FROM ITS INCEPTION. BUYER ACKNOWLEDGES THAT OTHER THAN EXPRESSLY AS STATED IN THIS AGREEMENT, NO REPRESENTATIONS HAVE BEEN MADE BY, OR HAVE BEEN RELIED UPON BY BUYER, TO INDUCE BUYER TO ENTER INTO THIS AGREEMENT."

Finally, near the end of the agreement in paragraph XI, entitled "Additional Terms or Conditions," the agreement states, in typed-in, capital letters: "SALE IS SUBJECT TO [AN INTERNAL REVENUE CODE SECTION] 1031 EXCHANGE WITH HOME LOCATED AT 4959 HERSCHOLT, LAKEWOOD, CALIFORNIA."[2] The agreement nowhere mentions the date of January 3, 2003, or that escrow would close by that date.

C. *Additional Testimony*

On direct examination, Alarid testified that Diaz assured him escrow would close by November 25, 2002, before his January 3, 2003, deadline. He later testified that Diaz told him that the November 25, 2002, date was "the estimated time of closing, and that usually they close within a short time of the estimated time of closing. . . . [¶] Plus she said we still have a little time there before closing to January 3rd, in case any little problems came up, so we should be fine."

Alarid further testified that, as he and Diaz were discussing the written agreement in her office on July 28, 2002, Diaz did not mention paragraph VII, direct his attention to it, or ask him to initial it. They did, however, discuss the "subject to" provision. Regarding this provision, Alarid testified he told Diaz that escrow had to close by January 3, 2003, and she assured him it would. According to Alarid's understanding, the "subject to" provision "superceded the one-year-to-complete boilerplate language of

[2] Several weeks after the agreement was signed, the parties signed an "Assignment and Substitution Agreement and Notice" and a "Substitution Amendment," which amended the agreement to substitute First American Exchange Corporation of California, the qualified intermediary, as the buyer in place of Alarid.

paragraph VII." Alarid acknowledged he read paragraph VII before he signed the agreement.

Diaz testified that she "stressed" to Alarid that the November 25, 2002, estimated completion or escrow closing date was an "estimate" because "that's what our purchase agreement states." She understood the "subject to" provision as allowing Alarid to cancel the agreement and sale in the event escrow did not close by January 3, 2003. According to Diaz's understanding, the "subject to" provision was a *sales contingency*, not a guaranteed escrow closing date. Diaz did not recall Alarid saying he did not want to enter into the agreement unless escrow would close by January 3.

By November 2002, construction of the Winchester home was not progressing as originally anticipated. The foundation had to be torn out because a plumbing inspection had been missed. Shortly before Christmas 2002, Diaz was leaving on vacation. At that time, she told Alarid that the escrow closing would be handled by K. Hovnanian's area coordinator, Sandy Adams. By that time, Diaz believed the Winchester home could still be completed by January 3, and that escrow could close by that date.

Escrow did not close on January 3, because the final building inspection had not been completed and no certificate of occupancy had been issued.[3] Escrow closed 20 days later, on January 23. As a result of the delay, Alarid was unable to defer $44,478 in capital gains taxes on his sale of the Lakewood property. Alarid rented the Winchester

[3] Because no certificate of occupancy had been issued, Alarid's lender was not willing to tender funds necessary for the escrow to close.

home to his stepdaughter and her family. In April 2003, he filed a complaint against K. Hovnanian, alleging causes of action for breach of contract, negligence, and fraud.

Alarid retired in December 2003. In May 2004, he sold the Winchester home for $345,000, realizing an approximate $90,000 profit. In July 2004, he and Francis, and his stepdaughter and her family, moved to Utah. Alarid used part of his sales proceeds from the Winchester property to purchase a lot in Utah, upon which he built a new personal residence. He did not invest any of the sales proceeds in a like-kind investment property.

D. *Statement of Decision*

Following the close of evidence in the nonjury trial, the parties submitted written closing arguments and the trial court took the matter under submission. On February 18, 2005, the trial court issued a statement of decision, granting judgment in favor of Alarid on his breach of contract cause of action, but denying judgment on Alarid's negligence and fraud causes of action.

On Alarid's breach of contract claim, the trial court found that the parties' written agreement was not integrated, and extrinsic evidence was therefore admissible to show a prior or contemporaneous agreement "*even if [the contemporaneous] agreement modifies an express provision of the written instrument*." (Italics added.) The trial court found Alarid's testimony credible, and noted, "Plaintiff has demonstrably shown that, notwithstanding the one-year completion date set forth in the contract, there was a contemporaneous agreement . . . that defendant was to complete his home . . . on or before January 3, 2003." The trial court found that K. Hovnanian breached the agreement by failing to close escrow by January 3.

In concluding that the agreement was not integrated, the trial court acknowledged that the written agreement had an integration clause. The court, however, said the written agreement was "a boilerplate contract," and the more formal the document, as here, the more likely the parties would have entered into a separate, collateral agreement. The court further found that the "subject to" provision was "reasonably susceptible" of meaning that K. Hovnanian agreed to complete the home so that escrow could close by January 3, 2003.

The court awarded Alarid $44,478, the amount he paid in capital gains taxes on his sale of the Lakewood property, plus costs. By posttrial motion, Alarid was awarded prejudgment interest. Judgment in favor of Alarid was entered on May 3, 2005.

## DISCUSSION

K. Hovnanian contends the trial court violated the parol evidence by interpreting the parties' written agreement based on extrinsic evidence which contradicted the express terms of paragraph VII of the written agreement. Specifically, K. Hovnanian claims that the trial court erred in concluding that the written agreement was not integrated, and to have credited -- in the face of paragraph VII of the written agreement -- Alarid's testimony that K. Hovnanian promised to close escrow on the sale of the Winchester home by January 3, 2003. We agree.

As we explain, the written agreement was fully integrated on the question of when escrow was guaranteed to close. Paragraph VII provided, in no uncertain terms, that escrow was guaranteed to close no later than July 28, 2003, not by January 3, 2003. And, under the circumstances surrounding the execution of the agreement, it is inconceivable

that the parties "might naturally" have agreed to a directly contradictory escrow closing term. In addition, the "subject to" provision of the written agreement had to be read consistently with paragraph VII. As such, the "subject to" provision cannot reasonably be construed to mean that escrow was guaranteed to close by January 3, 2003; instead, it could only be construed to mean that Alarid had the right to cancel the agreement in the event escrow did not close by January 3, 2003.

A. *Overview of Applicable Law*

The parol evidence rule prohibits the introduction of extrinsic evidence to add to, vary, or contradict the terms of an *integrated* written instrument. (Code Civ. Proc., § 1856;[4] *Masterson v. Sine* (1968) 68 Cal.2d 222, 225 (*Masterson*).) "The doctrine is based on the premise that the written agreement *is*, in those circumstances, the agreement of the parties. [Citation.] In other words, the law 'presumes a written contract supersedes all prior or contemporaneous oral agreements' [citation] . . . ." (*Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d. 1379, 1385.)

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[4] Code of Civil Procedure section 1856 provides, in pertinent part: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] . . . [¶] (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement . . . . [¶] . . . [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates . . . or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud."

"An integrated agreement is a writing or writings constituting a final expression of *one or more terms* of an agreement." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 13, italics added.) An integration may be partial or complete. It is partial if the parties intend the writing or writings to fully and completely express *only certain terms* of their agreement, rather than their agreement in its entirety. (*Id*. at p. 14.) Where writing is only partially integrated, the parol evidence rule applies to that part. (*Masterson, supra,* 68 Cal.2d at p. 225.)

In *Masterson*, the court said: "The crucial issue in determining whether there has been an integration is whether the parties *intended* their writing to serve as the exclusive embodiment of their agreement." (*Masterson, supra,* 68 Cal.2d at p. 225, italics added.) In determining the parties' intent or the issue of integration, the court may consider "*all the surrounding circumstances,* including the prior negotiations of the parties." (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002, italics added, citing *Masterson, supra,* at p. 226.)

"The instrument itself may help to resolve [the integration] issue. It may state, for example, that 'there are no previous understandings or agreements not contained in the writing,' and thus express the parties' 'intention to nullify antecedent understandings or agreements.' [Citation.]" (*Masterson, supra,* 68 Cal.2d at pp. 225-226.) On the integration issue, the court "must consider not only whether the written instrument contains an integration clause, but also examine the collateral agreement itself to determine whether it was intended to be part of the bargain." (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1002; *Masterson, supra,* at p. 226.)

"An oral agreement is creditable if it *might naturally* have been made as a separate agreement by parties similarly situated. It is also creditable unless it can be said with certainty that the parties would have included the oral agreement in the writing." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 388, italics added, fn. omitted, citing *Masterson, supra,* 68 Cal.2d at pp. 227-230.)

B. *Analysis and Conclusions*

1. The Written Agreement Was Integrated on the Escrow Closing Term

The question of whether a contract is fully or partially integrated is one of law for the court. Thus here, we are not bound by the trial court's determination that the parties' written agreement was not an integration. (*Banco Do Brasil, S.A. v. Latian, Inc., supra,* 234 Cal.App.3d at p. 1002.) Based on all of the relevant circumstances, we conclude that the written agreement *was* integrated on the issue of when escrow was guaranteed to close on the sale of the Winchester home.

We first note that paragraph VIII of the written agreement is an integration clause. In view of this provision, it appears that the parties intended the written agreement to be a full and complete embodiment of the terms of their agreement regarding the purchase and sale of the Winchester home.

Moreover, and notwithstanding the import of the integration clause, under the circumstances of this case it is inconceivable that the parties would or "might naturally" have entered into a separate oral agreement that escrow would close by January 3, 2003. (*Masterson, supra,* 68 Cal.2d at pp. 225-227.) Paragraph VII stated in no uncertain terms that escrow was guaranteed to close no earlier than one year from the effective date of the

agreement, that is, by July 28, 2003, and the parties signed the written agreement on July 28, 2002. Why, indeed, would the parties have entered into a *separate* oral agreement that escrow would close on January 3, 2003, in the face of paragraph VII and on the same date they signed the written agreement? No credible or creditable explanation appears on the undisputed facts of this record.

Diaz's "assurances" to Alarid, on the same date the written agreement was signed, that escrow would close by November 25, 2002 (the estimated completion date of the Winchester home), or in any event no later than January 3, 2003, were clearly based on the "estimated" November 25, 2002, completion date of the Winchester home. But paragraph VII of the written agreement stated that the November 25, 2002, estimated completion date was just that, "an estimate only," and that escrow was guaranteed to close *no earlier* than one year from the effective date of the agreement, that is, by July 28, 2003. In the face of the conflicting terms of paragraph VII, there is no reasonable basis to credit the proffered oral agreement.

Under these circumstances, the proffered oral agreement that escrow would close no later than January 3, 2003, is not creditable as a matter of law. It follows that the trial court erred, that is, it violated the parol evidence rule, in admitting the extrinsic evidence of the alleged oral agreement to contradict this term of the written agreement.[5]

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[5] Courts have noted that *Masterson* "does not go so far as to permit proof of a collateral agreement which contradicts an express provision of the written agreement. The reason for this is clear: it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement. Under *Masterson* then, parol evidence can be admitted only '"to prove the existence of a separate oral agreement

*[footnote continued on next page]*

2. The "Subject to" Provision Was a Sales Contingency

The trial court also found that the "subject to" provision of the written agreement, which stated that the "SALE IS SUBJECT TO [AN INTERNAL REVENUE CODE SECTION] 1031 EXCHANGE" with the Lakewood property, was "reasonably susceptible" of meaning that K. Hovnanian agreed to complete the Winchester property so that escrow could close by January 3, 2003. It is axiomatic that, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

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*[footnote continued from previous page]*

as to any matter on which the document is silent and which is not inconsistent with its terms. . . ."'" (*Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 271, citing *Masterson, supra*, 68 Cal.2d at p. 226; see also *Banco Do Brasil, S.A. v. Latian, Inc., supra*, 234 Cal.App.3d at p. 1002.) Alarid disputes these courts' statements of the law, noting that, in *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, the court observed that "*Masterson* nowhere states that a conflict between the oral and written agreements is a factor tending to show that the written agreement is not integrated. . . . Thus, the question of conflict between written and oral agreements is irrelevant to the question of integration." (*Id*. at p. 637, fn. 3.)

The present case illustrates that these apparently conflicting statements of the law may both be somewhat overstated. Here, the integration question turns on whether the proffered oral agreement that escrow was to close by January 3, 2003, is creditable or might naturally have been made in the face of paragraph VII of the written agreement, which stated that escrow was guaranteed to close by July 28, 2003. Thus, the contradiction between the oral and written agreements is certainly relevant to, if not controlling of, the integration question. But, in resolving the integration question, we have looked not only to the conflicting terms of the parties' written and alleged oral agreements. We have also assessed the legal creditability of the alleged oral agreement in light of *all* of the circumstances surrounding the execution of the written agreement. (*Masterson, supra*, 68 Cal.2d at pp. 225-230.) And in looking to these circumstances, we have found no reasonable basis to credit the alleged oral agreement on the integration question, particularly in light of paragraph VII of the written agreement. In other cases, there may be a reasonable explanation why the parties intended a collateral oral agreement to control over a conflicting written agreement. Here, however, there is none.

No writing is reasonably susceptible of a meaning which directly contradicts its unambiguous terms. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) In view of paragraph VII, which stated that escrow was to close by July 28, 2003, the "subject to" provision at the end of the agreement was *not* reasonably susceptible of meaning that escrow was guaranteed to close by January 3, 2003. The "subject to" provision was, however, reasonably susceptible of being construed as a *sales contingency* -- that is, as meaning that Alarid had the right to cancel the agreement and be relieved of his obligation to purchase the Winchester property, in the event escrow did not close by January 3, 2003. This construction gives effect to every part of the written agreement, including the "subject to" provision.

DISPOSITION

The judgment is reversed. K. Hovnanian shall recover its costs on appeal.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Gaut
J.